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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

EUNICE Y. CHO, Cross-complainant and Respondent, v. MORSE MEHRBAN, Cross-Defendant and Appellant.	B236204 (Los Angeles County Super. Ct. No. YC063554)

APPEAL from an order of the Superior Court of Los Angeles County, Dudley W. Gray, II, Judge. Order reversed and matter remanded with directions.

Law Offices of Rummel Bautista and Rummel Mor Bautista; Mehrban Law Corporation and Julie Mehrban for Cross-defendant and Appellant, Morse Mehrban.

Eunice Y. Cho, in pro. per.; Law Offices of Do & Do and Hieu D. Do, for Cross-complainant and Respondent.

In this case, the appellant Morse Mehrban (Mehrban) seeks reversal of the trial court's order denying his motion to strike the cross-complaint of respondent Eunice Y. Cho (Cho). Mehrban's motion was based on Code of Civil Procedure, section 425.16 (hereafter, § 425.16[1]; also known as the anti-SLAPP statute[2]). He argued that the claims asserted in the cross-complaint arose from his filing of the multiple complaints which he had done on behalf of his disabled clients, including one against her in a *related* action. He contended that such actions on his part were constitutionally protected activity within the meaning of the anti-SLAPP statute and the claims asserted by Cho were barred by the *absolute* litigation privilege (Civ. Code, § 47, subd. (b).) Although he was asserting a purely legal argument, the trial court denied the motion to strike on the sole ground that Mehrban had failed to file a declaration in support of his motion.[3]

We find ourselves in agreement with Mehrban on the law applicable to this case. As we discuss below, it is well established that the litigation privilege will bar any tort claim except one for malicious prosecution. (*Flatley v. Mauro* (2006) 39 Cal.4th 299,

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[1] Unless otherwise indicated, all statutory references are to the Code of Civil Procedure.

[2] SLAPP is an acronym for Strategic Lawsuit Against Public Participation.

[3] Mehrban had filed instead a motion requesting the trial court to judicially notice the filing in the aforesaid related action of the complaint that he had filed on behalf of his client which was very similar to the one filed in this action by a different attorney on behalf of a different plaintiff. It appears that the trial court never ruled on Mehrban's request for judicial notice or considered the allegations in either of the complaints.

322.) Thus, the trial court erred in denying Mehrban's motion to strike. It should have been granted. We will therefore reverse and remand the matter with directions.

FACTUAL AND PROCEDURAL BACKGROUND[4]

On June 24, 2010, Mehrban, on behalf of his client Thomas Munday, filed a complaint in an action related to this one against Cho for damages and injunctive relief for violations of the Unruh Civil Rights Act (Civ. Code, § 51, et seq.) and the Americans with Disabilities Act Standards for Accessible Design (42 U.S.C., § 12182, 28 C.F.R., § 36.304). In this complaint, it was alleged that Cho (and her husband, Dennis Y. Cho)[5] owned and operated a liquor store and an attached parking lot. In the complaint that he filed, Mehrban alleged that Munday could not walk and was wheelchair bound. He drove a specially equipped van with a wheelchair ramp. Specifically, Mehrban alleged that Munday "was unable to park in [the] parking lot because it lacked a striped van-accessible handicap parking spot with a 96-inch-wide access aisle and corresponding signage . . . . "[6]

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[4] The facts that we recite are those demonstrated by the appellate record before us. They are essentially procedural in nature and are undisputed.

[5] For convenience, we use the name Cho to refer, where appropriate, to both of these parties.

[6] Mehrban included the following allegations in his complaint: "[Munday's] vehicle is specially equipped with a wheelchair ramp that ejects, protrudes, and extends from the side of his vehicle onto the ground such that he may enter and exit his vehicle. [Munday] requires the use of at least one striped van-accessible handicap parking spot with a 96-inch-wide access aisle and corresponding signage in order to enter and exit the vehicle using the ramp. Unless the striping and signage are present, there is nothing to prevent another vehicle from parking immediately adjacent to [Munday's] vehicle. The lack of signage and striping is significant because [Munday] relies on them to enter

Mehrban, on behalf of his client, alleged that this failure to provide proper handicap parking and signage constituted violation of both the Unruh Civil Rights Act and the federal ADA and related regulations. He prayed for $4,000 in damages, a permanent injunction, attorney's fees and costs. The complaint filed on behalf of Munday, however, was not the underlying complaint in this action, but rather a related action. On a date for some reason not reflected in the record, but subsequent to the filing of the Munday complaint, the underlying complaint was filed by attorney H. J. Sims (Sims) on behalf of an alleged disabled plaintiff named Willie Fontano (Fontano). It named Cho as the defendant and apparently alleged substantially the same allegations as set forth in the related Munday complaint.

Cho's response to these two complaints was to file, on December 7, 2010, the cross-complaint which is the subject of this appeal.[7] In it, she alleged causes of action for unfair business practices (Bus. & Prof. Code, § 17200 et seq.) and intentional

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and exit his vehicle. Even if another vehicle is not parked too close to his vehicle for him to exit, [Munday] may be unable to reenter it if another vehicle parks within the 96-inch-wide clearance zone while he's away. This has happened to [Munday] before. A striped 96-inch-wide access aisle and signage lets other drivers know that they cannot park too close to [Munday's] vehicle. Therefore, [Munday] relies on a striped van-accessible handicap parking spot with a 96-inch-wide access aisle and corresponding signage to enter and exit his vehicle safely when he parks in a parking lot. [¶] Removing this architectural barrier would have been readily achievable (easily accomplishable and able to be carried out without much difficulty or expense)."

[7] In her cross-complaint, Cho had named as cross-defendants not only Mehrban, but also Munday, Sims and Fontano. Apparently, however, only Mehrban filed the motion to strike and he is the only appellant involved in this proceeding. Indeed, the record suggests that both the underlying Fontano complaint as well as the related Munday complaint have since been dismissed and are no longer pending.

fraudulent and negligent abuse of process. Although the cross-complaint is largely argumentative and conclusionary (and, at times, incomprehensible), it is clear that Cho is seeking recovery of damages arising from the conduct of Mehrban (and the other cross-defendants) in filing the two complaints against her. She alleges that they are essentially sham pleadings and simply a part of the way Mehrban and Sims make their living. That is, they bring these kind of lawsuits against small business owners on behalf of disabled clients and attempt to negotiate settlements with businesses not in compliance with the relevant statutes and related regulations.[8]

On July 12, 2011, Mehrban filed his anti-SLAPP motion seeking to strike Cho's cross-complaint.[9] That motion was essentially based on the legal argument that Mehrban, in filing the complaint in the related action, was engaging in protected activity and Cho could not, as a matter of law, establish a probability of prevailing due to the application of the litigation privilege. Mehrban's motion was, however, not supported by any declaration.

Cho filed an opposition to which there was attached a declaration which largely mirrored the allegations in the cross-complaint and which the trial judge characterized

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[8] The appellate record suggests that Mehrban has been involved in a number of such legal actions and has himself been sued on at least on one occasion by a business owner whose reaction was similar to Cho's. (See *JSJ Limited Partnership v. Mehrban* (2012) 205 Cal.App.4th 1512.)

[9] Cho's cross-complaint was not served on Mehrban until approximately May 18, 2011. Thus, there is no issue with respect to the 60-day limit for bringing an anti-SLAPP motion (§ 425.16, subd. (f).)

as "17-pages long of rambling I don't know what."[10] The important point about Cho's opposition is that it does not contradict Mehrban's main point. That is, the cross-complaint against Mehrban is based on and clearly arises from his actions in filing the complaint against her which she claims is a sham and is frivolous.

When Mehrban's motion came on for hearing on September 12, 2011, the court denied it with the following explanation of the ruling: "The court believes [the motion] deficient in that it fails to comply with the fundamental requirements of [section] 425.16(b)(2). There are no supporting or opposing affidavits stating the facts on which the motion is based." It appears that the trial court rejected Mehrban's contention that, given the undisputed record, the motion could be resolved on legal grounds and a supporting factual declaration in support of the motion was not required.

Mehrban thereafter filed this timely appeal.

CONTENTIONS

Mehrban argues that the trial court erred in denying his motion because no declaration was required. The record itself demonstrated that Cho's cross-complaint was obviously based on and arose from the protected activity of filing a legal action against her.

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[10] This declaration was the object of written evidentiary objections by Mehrban on which the trial judge did not rule. We have reviewed those objections, which were directed to substantially *all* of Cho's declaration. We believe all of the objections were well taken and should have been sustained. In light of the legal basis on which we resolve this matter, however, we need not consider or discuss the issue of the adequacy of Cho's declaration further.

Cho's arguments are not entirely clear, but it seems that she believes that she has the right to protect herself and her business against the kind "nit-picking" type of lawsuit that Mehrban has brought against her and other small businesses.

As we explain, we agree with Mehrban. Cho's cross-complaint is subject to his anti-SLAPP motion and, in light of this record, it should have been granted.

DISCUSSION

1. *Standard of Review*

An order denying a motion to strike under the anti-SLAPP statute is directly and immediately appealable. (§§ 425.16, subd. (1); 904.1, subd. (a)(13).) We review such an order de novo. (*Flatley v. Mauro, supra,* 39 Cal.4th at p. 325.) We review and evaluate the circumstances reflected by the record liberally in favor of Mehrban to determine whether it will defeat Cho's claim as a matter of law. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.)

2. *General Legal Principles Applicable to an Anti-SLAPP Motion*

"A SLAPP suit—a strategic lawsuit against public participation—seeks to chill or punish a party's exercise of constitutional rights to free speech and to petition the government for redress of grievances. [Citation.] The Legislature enacted Code of Civil Procedure section 425.16—known as the anti-SLAPP statute—to provide a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights. [Citation.]" (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055-1056.) "The goal [of section 425.16] is to eliminate meritless or retaliatory

litigation at an early stage of the proceedings." (*Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798, 806.)

Section 425.16, provides that "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).) In considering the application of the anti-SLAPP statute, courts engage in a two-step process. " 'First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. . . . If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim.' [Citation.]" (*Taus v. Loftus* (2007) 40 Cal.4th 683, 712.) " ' " 'The defendant has the burden on the first issue, the threshold issue; the plaintiff has the burden on the second issue. [Citation.]' [Citation.]" [Citations.]' " (*Rohde v. Wolf* (2007) 154 Cal.App.4th 28, 34–35.) " 'Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.' [Citation.]" (*Governor Gray Davis Com. v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 456.)

"To demonstrate a probability of prevailing on the merits, the plaintiff must show that the complaint is legally sufficient and must present a prima facie showing of facts

that, if believed by the trier of fact, would support a judgment in the plaintiff's favor. [Citations.] The plaintiff's showing of facts must consist of evidence that would be admissible at trial. [Citation.] The court cannot weigh the evidence, but must determine whether the evidence is sufficient to support a judgment in the plaintiff's favor as a matter of law, as on a motion for summary judgment. [Citations.]" (*Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1346.)

3. *Mehrban's Action In Bringing An Action Against Cho on Behalf of His Client Was Protected Activity*

Cho argues here that Mehrban's actions in this matter are simply part of a larger general scheme by which he and his clients go about abusing small businesses in the hope that they will quickly settle the technical claims asserted and the claims are thus without any real merit. Therefore, such actions should not constitute protected activity and Cho should be entitled to go forward with the tort claims asserted in the cross-complaint. We disagree.

The subjective intent of a party in filing a complaint is irrelevant in determining whether it falls within the ambit of section 425.16. "There simply is 'nothing in the statute requiring the court to engage in an inquiry as to the plaintiff's subjective motivations before it may determine [whether] the anti-SLAPP statute is applicable.' (*Damon v. Ocean Hills Journalism Club* [(2000)] 85 Cal.App.4th [468,] 480.)" (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 58.)

The complaint filed by Mehrban on behalf of his client Munday was a "written or oral statement or writing made before a . . . judicial proceeding. . . . " (§ 425.16,

subd. (e)(1); (["Defendants' act of filing the complaint [for abuse of process] in the underlying action squarely falls within section 425.16, subdivision (e)(1)"] *Contemporary Services Corp. v. Staff Pro Inc.* (2007) 152 Cal.App.4th 1043, 1055.) Filing a lawsuit is an act in furtherance of the constitutional right of petition, regardless of whether it has merit. (See, e.g., *Navellier v. Sletten* (2002) 29 Cal.4th 82, 90; *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115.)

The cross-complaint was plainly based on Mehrban's actions in filing the complaint against Cho and all of the other necessarily related activities (e.g., investigation, taking pictures of the parking lot, etc.). Therefore, his actions as alleged in the cross-complaint clearly arose from protected activity and are the proper basis for a motion to strike under the anti-SLAPP statute. Based simply on the appellate record before us, Mehrban has therefore met his burden of satisfying the first issue raised in this two-step process.

4. *As a Matter of Law, Cho Cannot Meet the Burden of Demonstrating A Probability of Prevailing*

The burden thus falls on Cho to prove the second issue and present evidence sufficient to demonstrate that she has a probability of prevailing. Cho's cross-complaint seeks recovery on claims for the torts of both intentional and negligent abuse of process and the business tort of unfair competition. The gravamen of these claims plainly rests upon Mehrban's act of filing a complaint against Cho for certain statutory violations related to disabled persons. In light of this circumstance, Cho is subject to the defense of the litigation privilege. It is settled law that this privilege is an *absolute* one. It bars

all tort causes of action except malicious prosecution. (*Flatley v. Mauro, supra,* 39 Cal.4th at p. 322.) Obviously then, the litigation privilege is necessarily determinative of the question of Cho's ability to demonstrate that there exists a probability of prevailing on the cross-complaint. "The privilege in section 47 is 'relevant to the second step in the anti-SLAPP analysis in that it may present a substantive defense the plaintiff must overcome to demonstrate a probability of prevailing. [Citations.]' [Citation.]" (*Rohde v. Wolf, supra,* 154 Cal.App.4th at p. 38.)

Thus, it is clear, again from the appellate record alone, that Cho, on the face of that record, is unable, as a matter of law, to show a probability of prevailing on the cross-complaint. It was therefore not necessary for Mehrban to provide any declaration respecting factual circumstances. The pleadings before the court, including the complaint that he filed in the related action,[11] demonstrate the clear application of the litigation privilege as an absolute defense to all of the claims asserted by Cho in the cross-complaint. The trial court erred in denying Mehrban's anti-SLAPP Motion to Strike. It should have been granted.

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[11] As we have noted, it does not appear that the trial court ever addressed on the record Mehrban's request for judicial notice of that pleading. For purposes of this appeal, we have done so. (Evid. Code, §§ 452, 454.)

DISPOSITION

The order of September 12, 2011 denying Mehrban's Motion to Strike is reversed and the matter is remanded with directions to the trial court to enter a new order granting the motion and to conduct such further proceedings as may be appropriate. Mehrban shall recover his costs in this matter.

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CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

ALDRICH, J.